PD-0787-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0787-18

DEMOND FRANKLIN	§	**COURT OF**
	§	
VS.	§	**CRIMINAL APPEALS**
	§	
THE STATE OF TEXAS	§	**OF TEXAS**

APPELLANT'S AMENDED MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW, appellant, DEMOND FRANKLIN, who, by and through his appellate counsel of record, Mr. Dean A. Diachin, and pursuant to TEX. R. APP. P. 79.1, does hereby file this motion for rehearing, and in support thereof would show the Court the following:

I. Procedural History.

In a published opinion delivered July 3, 2019, this Honorable Court affirmed appellant's conviction for capital murder. This motion for rehearing was filed within fifteen [15] days after the opinion was delivered, and is thus timely. TEX. R. APP. P. 79.1 (West 2017).

II. Points Relied Upon For Rehearing.

A. The Applicable Legal Standard.

(i). Who Serves as the Fact-Finder at Punishment?

The issues before this Court in this case include: (1) who bears the burden to prove a defendant's age at the time of a capital offense; (2) at what phase of a capital trial must the fact-finder resolve questions of fact raised regarding the defendant's age; and (3) does the status of a defendant being underage, when properly raised and proven, function as a defense or an affirmative defense?

In deciding these issues, this Court has held:

> A review of … [§ 12.31(a)] makes clear that … [t]he age of the offender comes into play only after he has been "adjudged guilty of a capital felony"… and the defendant logically carries the burden of producing *some evidence* that he committed the offense while he was younger than age 18. If he produces such evidence, the State must then prove beyond a reasonable doubt that the defendant was in fact 18 years old or older.

See Franklin v. State, PD-0787-18, ___ S.W.3d ___ 2019 WL 2814861, at. *3-4, (Tex. Crim. App. 2019) (emphasis added). This Court also noted:

> [t]he interaction between §§ 8.07(c) and 12.31(a) supports a conclusion that the status of being under age 18 is a defensive issue whenever that status is implicated in a capital murder prosecution …. [Thus,] Appellant had the burden to produce *some evidence* that he was under age 18 at the time of the offense.

Franklin, 2019 WL 2814861at *4-5 (emphasis added). As a result, the legal principles governing a capital defendant's age appear to be:

(1). A defendant must prove he was under age 18 whenever his age is implicated in a capital murder prosecution.

(2). For the issue to be "implicated," a capital defendant must specifically "request an opportunity to litigate such a claim [at the punishment phase of his trial]". Merely pleading not guilty and electing the jury for punishment is apparently not enough.

(3). When properly raised and proven, a defendant's underage status at the time of the offense serves as a defense, not as an affirmative defense. That is, the defendant must first produce "some evidence," from which the jury could rationally find that he was under age 18 at the time of the offense, whereupon the burden shifts to the State to disprove that defense beyond a reasonable doubt.

The Fourth Court of Appeals, on the other hand, has held this same issue is an affirmative defense that a defendant must prove at punishment (apparently to a *judge*) by a preponderance of the evidence. The following illustrates:

> we hold the burden of proof is upon Garza to establish by a preponderance of the evidence that he was under the age of eighteen at the time of the offense…[and if] Garza fails to prove by a preponderance of the evidence that he was under the age of eighteen at the time of the offense, the trial court must sentence him to life without the possibility of parole.

Garza v. State, 453 S.W.3d 548, 555 (Tex. App.—San Antonio 2014, pet. ref'd) (emphasis added).

Appellant hereby respectfully requests this Honorable Court clarify that: (1) all capital defendants have a right to demand that a *jury* resolve any questions of fact raised at punishment about their age at the time of the offense; and

(2) whenever a capital defendant properly raises at punishment the issue of whether he was under age 18 at the time of the offense, that fact, if believed, functions as a defense, and not as an affirmative defense.

Such clarification is needed for two [2] reasons. First, the very second headnote reported by "Westlaw" for this case erroneously states:

> **Criminal Law**
> Matters of defense and rebuttal in general
>
> A defendant's age at the time of the offense is an *affirmative defense* for which the defendant bears the burden of proof.
>
> Cases that cite this headnote

Franklin, 2019 WL 2814861, Headnote No. 2 (emphasis added). Second, that headnote may have been caused by including certain *dicta* on this point that may be construed as inconsistent with the principles summarized above. *See Franklin*, 2019 WL 2814861 at *5 (stating, "as a matter in the nature of an *affirmative defense*, it was Appellant's burden to produce evidence and to prove that he was under age eighteen at the time of the offense") (emphasis added). Removing the word "affirmative" from the sentence in the preceding parenthetical would be one simple remedy.

(ii). Aggravating Factor or Mitigating Factor?

Appellant also requests this Honorable Court reconsider changing its opinion to hold that a defendant's age at the time of a capital offense is an "aggravating factor" that the State must prove beyond a reasonable doubt at guilt-innocence, and not a "mitigating factor" for which defendants must produce some evidence at punishment. Here, this Court has reasoned:

> The United States Supreme Court has held that the State may "choose to recognize a factor that mitigates the degree of criminality or punishment" without being required "to prove its nonexistence." We have followed this holding, concluding that the United States Constitution does not require the State to bear the burden of proof on an issue that, if answered affirmatively, would reduce, rather than increase, the sentence. If being under age 18 is a fact that reduces the otherwise applicable sentence, then a statute can place the burden of proof on the defendant to show that fact without violating the Constitution.

Franklin, 2019 WL 2814861, at *3-5. But, depending on how they are framed, almost any question of fact can be asked in a way that, if answered affirmatively, would work to reduce, and not increase, the sentence that must follow. By the rationale used here, for example, because a defendant's status of being not guilty is question of fact that, if answered affirmatively, would likewise necessarily reduce the sentence that would follow, the Texas legislature ought to, in theory, be able to place the burden to prove *that* fact upon the defendant, as well, without violating the U.S. Constitution.

Indeed, if the question of fact at issue here is only slightly reframed, so as to ask whether a defendant was *over* the age of 18 at the time of the offense, then an affirmative answer would suddenly render that issue and "aggravating factor" that, from a constitutional perspective, the State must prove beyond reasonable doubt to a jury at guilt-innocence. So, simply reformulating a question so that an affirmative answer leads to a lesser penalty should not be interpreted as a license to mete out substantially disparate penalties in capital cases based solely on facts that are neither submitted to, nor considered by, the factfinder. At bottom, capital defendants in Texas should not have to prove they were under the age 18 in order to avoid the worst of what Texas sentencing practices have to offer; rather, the State should have to prove that the person was over the age of 18 if they want to avail themselves of the worst of what Texas sentencing practices have to offer.

B. Forfeiture of a Meritless Claim?

This Honorable Court has written:

> The heart of a *Miller* claim is the assertion that the Constitution would be violated…because he was underage at the time of his offense. Appellant does not claim that he was under the age of 18 at the time of his offense. The claim that he calls a *Miller* claim [really] concerns who has the burden to prove [his] age . . . A defendant who wishes to rely on *Miller* must claim that he was under the age of 18 at the time of his offense. Because Appellant has not done so, either at trial or on appeal, a *Miller* claim is not before us. We agree with the court of appeals that, because he did not raise his claim regarding who bears the burden on the issue of age, he has forfeited this [non-*Miller*] claim.

Franklin, 2019 WL 2814861, at. *2.

Two [2] problems with this passage exist. First, it suggests that, if, at trial, appellant had only claimed that the State possessed the burden to prove he was over age 18 at the time of the offense, then his claim wouldn't have been forfeited. But in having reached the merits of that forfeited claim, this Court has now clarified that no such claim *could* have been raised below, for the burden in question now (and only now) belongs to the defendant. Appellant would thus respectfully submit that emphasizing this "forfeiture"—which can only be said to have occurred as a direct product of the instant decision—is of limited utility.

Second, it could also create confusion because the intermediate appellate court did not ground its ruling on who bore the burden to prove the appellant's age at the time of offense. Only this Court noticed that distinction. Instead, the ruling below was much more harmful. *See Franklin v. State*, 2018 WL 3129464 (Tex. App.—San Antonio 2018, pet. granted) (mem. op., not designated for publication) (ruling, "because Franklin failed to raise the issue of whether he was eighteen years' old at the time of the offense, the issue *cannot* be raised now on direct appeal"). This ruling runs directly counter to this Court's opinion in *Garza*, which held that a *Miller* claim *can* be raised for the first time on direct appeal. *See Garza v. State*, 435 S.W.3d at 261, 262 (stating, "[w]e reverse the

court of appeals' decision because it conflicts with this Court's subsequently delivered opinion in *Ex parte Maxwell*"). Under its stated rationale, the court of appeals will only consider evidence "raised at trial," and not anything that is claimed for the first time on direct appeal. Thus, appellant would respectfully request that this Honorable Court, at a minimum, not include anything in its opinion that could be misconstrued as agreement with the erroneous ruling advanced below. What's more, absolutely no harm to this Court's analysis or reasoning will occur if the entire final sentence of the passage quoted above were omitted, altogether, or at least replaced by language with less potential to create confusion, such as:

> While we have previously held claims that a defendant was under age 18 at the time of the offense may be raised for at the first time on direct appeal, we also find the separate & distinct issue now before this court—over who bears the burden to prove the defendant's age in a capital case—has hereby been rendered moot.

C. What must a Defendant Do to "Request an Opportunity" to Litigate a *Miller* Claim & the Authority to Remand for that Purpose.

On this point, this Court has reasoned:

> Appellant also suggests that he might be entitled to a remand to litigate and substantiate a *Miller* claim. For this proposition, he cites the court of appeals's remand opinion in *Garza*. That opinion is not binding on us, and we need not decide here whether we would find it persuasive on its facts because that case is distinguishable. Because, unlike Garza, Appellant has not raised a *Miller* claim, he is not entitled to a remand.

The notation that this Court is not bound by the court of appeals' opinion in *Garza* is certainly welcome. However, to support a call for a new hearing so that a jury may finally determine his age in this case, appellant cited more than just the court of appeals' remand for more fact-finding in *Garza;* appellant cited *this* Court's opinion in both *Garza* & *Maxwell*. In his opening brief, appellant noted:

> In *Garza*, both this Court and the court of appeals agreed that a defendant's age at the time of the offense is a question of fact that must be resolved by a factfinder. *See, e.g., Garza v. State*, 435 S.W.3d 258, 262 (Tex. Crim. App. 2014) (noting in *Ex parte Maxwell* relief included "vacating…[the] life-without-parole sentence and remanding the case for further sentencing proceedings permitting the factfinder to determine whether…sentence should be assessed at life with or without parole"); *Garza II*, 453 S.W.3d at 553 (observing that "[b]oth parties agree there must be a factual determination as to Garza's age at the time of the offense," and ruling, "we remand this matter to the trial court for resentencing in accordance with this court's opinion").
>
> …
>
> [And thus], even if appellant did somehow bear a burden to prove his age at sentencing, the trial court nevertheless reversibly erred by not allowing appellant an opportunity to meet that burden before his jury.

Appellant's Amended Brief, p. 22, 24 (filed here: February 4, 2019). At bottom, given appellant could not possibly have known he was forfeiting a defense at the "punishment hearing" that occurred below, a remand here would only seem fair.

Indeed, what of the fact that, despite his written election to the contrary, the trial court dismissed his jury without asking anyone if doing so was consistent with appellant's election? Given the sentence imposed here was automatic,

was appellant ever informed that he even *had* a right to have a jury consider his age after he was convicted in this case?

If the legal defense—identified now for the very first time—can be forfeited under these facts, then what exactly must a defendant do "to request an opportunity to litigate" the issue of his age at the punishment phase of his trial? Upon conviction, must he present his evidence to the judge, and then ask that the jury be allowed to consider the same? Or must he, at some point, simply file a notice with trial court and, if convicted, then ask to present his "age evidence" to his jury at punishment? Or must all evidence be presented at guilt-innocence, and then a § 12.31(a) instruction simply requested later? Or perhaps the trial court should *be* the factfinder? Given no remand is available to make a record on these important legal questions, any guidance this Court might provide now will undoubtedly be appreciated by both the bench and the bar.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays this Honorable Court changes its opinion to hold that a defendant's age at the time of a capital offense is an element the State must prove beyond a reasonable doubt at guilt-innocence; or, in the alternative, clarify that: (1) all capital defendants have a right to demand that a *jury* resolve questions of fact raised at punishment

over their age at the time of the offense; (1) a finding of being under age 18 at the time of a capital offense functions as a defense, and not an affirmative defense; and (3) the separate and distinct claim made here—over who had the burden to prove appellant's age in this case—has simply been rendered moot, and could not have been forfeited knowingly.

Respectfully submitted,

MICHAEL L. YOUNG
Chief Public Defender

BY: *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender
101 W. Nueva St., Suite 370
San Antonio, Texas 78204
T.B.N.: 00796464
Phone: (210) 335-0701
Fax: (210) 335-0707
E-mail: dean.diachin@bexar.org

LEAD COUNSEL FOR APPELLANT.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been delivered by "e-service" to Jay Brandon; Bexar County District Attorney's Office & the State Prosecuting Attorney, Austin, TX on this 21st day of July 2019.

Dean A. Diachin
DEAN A. DIACHIN
Bexar County Assistant Public Defender.